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To: Loyal Mehrhoff <(b) (6)>
CC: Kristi Young <(b) (6)>; Jess Newton <(b) (6)>; Earl Campbell <(b) (6)>; Leilani Takano <(b) (6)>
Sent: 8/28/2013 11:09:02 AM
Subject: RE: Discussion of DON Consultations on Extirpated Species on Guam
Attachments: JGPO Response to 19 August FWS Email Re Extirpated Species.doc; smime.p7s

Loyal,

This email and attached word document responds to your email of August 19th in which provided your rationale for why consultation under Section 7 of the ESA is required on Navy projects affecting unoccupied habitat for extirpated species on Guam. Based upon our subsequent telephone call on August 22nd, it is our understanding that while you indicated in your email that this matter was under review at your Regional and National offices, we should not anticipate any further guidance from those offices and were advised to work with your office to reach resolution at the local level. Accordingly, the attached document responds to the various points set forth in your August 19th email.

Recognizing that we will soon be submitting our species request letter to support future consultations regarding the proposed changes to the relocation of Marine Corps forces to Guam, I think that it is necessary to engage in a follow-on discussion within the next couple of weeks on this issue. I will call/email you to schedule the discussion.

V/R,
Dan

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-----Original Message-----

From: Loyal Mehrhoff [mailto:(b) (6)]
Sent: Monday, August 19, 2013 23:02
To: Cecchini, Joseph D CIV OASN EI&E, JGPO
Cc: Kristi Young; Jess Newton; Earl Campbell; Leilani Takano
Subject: Discussion of DON Consultations on Extirpated Species on Guam

Dan,

In an earlier meeting, you asked me to provide information on why it is appropriate for Navy to consult with the USFWS on projects affecting currently unoccupied habitat for the Guam Micronesian kingfisher, Mariana crow, and Guam rail. The following discussion covers my primary rationale for why consultation is required, though this topic is also under review at our Regional and National offices, so there may be additional input in the future. I wanted to get this to you now, so that we can have a more productive meeting later this week.

Brief Background. The Guam bridled white-eye, Guam broadbill, little Mariana fruit bat, Guam Micronesian kingfisher, Guam rail, Mariana crow, and Micronesian megapode are listed as endangered under the US Endangered Species Act. All seven of these species were, at one point, extirpated from the wild on Guam - most recently due to predation by introduced brown treesnakes. The first three species (white-eye, broadbill, and fruit bat) are extinct, with no remaining individuals either in the wild or in captivity. The remaining four species are not extinct and have either wild populations on other islands, experimental populations, or captive populations. The kingfisher currently survives as a captive population on Guam and mainland zoos. The crow survives in the wild on the island of Rota in very low numbers. The Guam rail has a captive population on Guam and the mainland and experimental populations on Cocos Island (a small island one mile off of the coast of Guam) and the island of Rota, CNMI. The megapode has wild populations on several islands in the CNMI. USFWS recovery plans call

for the reintroduction and establishment of wild populations on Guam for the kingfisher, crow, and rail. Recovery plans do not call for the reintroduction of the megapode or the three extinct species back onto Guam.

Requirement for Consultation. Rationale for consultation under the Endangered Species Act.

1. Cooperative Agreement Direction. The 1993 Cooperative Agreement between the Air Force, Navy, and USFWS committed parties to consult under Section 7 of the Endangered Species Act on proposed Federal actions that are funded, authorized, or carried out by the Federal government within the Refuge, inclusive of Overlay Refuge lands, "that may impact habitat of endangered or threatened species, even if those species are extirpated from the affected areas, but are not extinct." This agreement is still in place and the crow, kingfisher, and rail are not extinct; therefore, consultation is expected.

2. General Endangered Species Act Requirements. Under Section 7(a)(2) of the Endangered Species Act, Federal agencies shall, in consultation with the USFWS, ensure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. To jeopardize is defined at 50 CFR 402.02 as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." By regulation 50 CFR 402, the Navy has a duty to consult with USFWS if its actions "may affect" listed species. If the action is not likely to adversely affect the species, consultation may be concluded at the "informal" level. If actions are likely to adversely affect the species (directly or indirectly), then formal consultation is required. This requirement is not area dependent, but outcome dependent. If the action, whatever it is, affects listed species, consultation is required. Obviously, the destruction of habitat needed for the recovery of listed species is one of many outcomes that may affect listed species, sometimes to the point of being an adverse effect or even potentially rising to the level of jeopardizing the continued existence of a species. Navy has an obligation to ensure that consultation occurs and jeopardy is not reached. Please note that in a similar situation dealing with the endangered black-footed ferret, USFWS issued a jeopardy biological opinion on a Federal action affecting habitat during the period when this species was entirely in captive propagation.

Additional Considerations. One portion of the regulations is generating confusion as to whether or not consultation and the preparation of a biological assessment is required or if it is discretionary. 50 CFR 402.12(d)(1) states that "If the Director advises that no listed species or critical habitat may be present, the Federal agency need not prepare a biological assessment and further consultation is not required." How one interprets if a species "may be present" is important. Our office considers that a species may be present if all of the following conditions are met:

1. The area and the timeframe of the action may impact the historical or current range of the species or affect individuals of the species. This approach ensures that all effects of an action on listed species are considered in our analyses.

2. The species is extant or may be extant. If a species is known to be extinct, we do not consider it present. Species that occur only in captivity are considered extant, because they have some individuals of the listed species still surviving. On Guam, we consider the white-eye, broadbill, and little Mariana fruit bat to be extinct. These species have no known wild or captive populations or individuals. We do not expect Navy to consult on impacts to unoccupied habitat for these extinct species. Please note that if individuals of these species were to be located in the future, this interpretation would change to include such species as being extant.

3. The species is currently or may be occupying the action area, migrates through the area, intermittently uses the area, is dependent upon the action area for some aspect of its life history, or requires the area for future population expansion to meet recovery needs. If a species is definitively not found in the action area, we would not expect Navy to consult unless the area was identified as an area needed for recovery of the species.

a. Our recovery plans do not call for the re-establishment of megapodes on Guam, so, we do not expect Navy to consult on impacts to unoccupied megapode habitat.

b. Our recovery plans do call for the eventual re-establishment of populations of kingfisher, crow, and rail on Guam. Overlay Refuge lands comprise a substantial portion of the total habitat available for recovery of the kingfisher, crow, and rail and have been identified as essential to the recovery of these species (all aspects of their life histories). We cannot recover these species without adequate habitat. Re-introduction efforts have already been

undertaken for the rail and crow, and are under consideration for the kingfisher. Both the USFWS and Navy have, and continue to, invest in research efforts aimed at the control of brown treesnakes. As control efforts continue, we expect that the kingfisher, crow, and rail will be re-introduced onto Guam in the foreseeable future and, thus, may be present for consultation purposes during the timeframe the action affects essential habitat.

From my perspective, the above items paint a clear need for the Navy to consult on impacts to crow, kingfisher, and rail habitat on Guam. Please let me know if you want to discuss this issue further.

Thank you,

Loyal

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